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April 3, 2023

SUBMITTED VIA REGULATIONS.GOV

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: Coverage of Certain Preventive Services Under the Affordable Care Act

Dear Secretary Becerra, Acting Secretary Su, and Secretary Yellen:

We write in opposition to the proposed rules published by the Departments of Health and Human Services (HHS), Labor, and the Treasury (Tri-Agencies) titled "Coverage of Certain Preventive Services Under the Affordable Care Act."¹ The proposed rules seek to eliminate the exemption to the coverage of contraceptive services for entities with moral objections and creates an unauthorized new regulatory program for contraceptive services furnished by providers. The administration's continued attempts to force employer-sponsored plans to provide free contraception coverage while creating a new federal slush fund for abortion providers are not only misguided but also exceed the Tri-Agencies' statutory authority.

¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7,236 (proposed Feb. 2, 2023).

The Proposed Rules Exceeds the Tri-Agencies' Authority

The proposed rules significantly depart from previous policy and conflicts with the *Affordable Care Act* (ACA). The proposed rules create a new unauthorized program, deemed the “individual contraceptive arrangement,” through which women enrolled in plans provided by objecting entities can access contraceptive services at no cost. Through the individual contraceptive arrangement, a provider of contraceptive services would be able to seek reimbursement from a qualified health plan (QHP) with which it has an agreement. The QHP that agrees to reimburse an eligible provider of contraceptive services would then receive a lower federally facilitated exchange (FFE) user fee or state exchange on the federal platform (SBE-FP) user fee that accounts for the cost of the contraceptive services, plus an allowance for administrative costs and margin.

Since the Obama administration created the original accommodation process in 2013, the Tri-Agencies' use of the ACA user fee to fund contraceptive services has exceeded its statutory authority.² Congress did not allow the use of the exchange fees to apply to anything other than the administration of the exchange. The ACA states,

in establishing an Exchange under this section, the State shall ensure that such Exchange is self-sustaining ..., including allowing the Exchange to charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, *to support its operations*.³

The proposed rules deviate even further from the statute by creating an individual contraceptive arrangement, which allows any qualified health plan to act as a participating issuer and pay for contraceptive services through a formalized arrangement with a provider. This arrangement is completely new and separate from the original accommodation process implemented in 2013.

Additionally, HHS proposes to allow the provider of contraceptive services to reside outside of an FFE or SBE-FP state, so that a provider would be able to seek reimbursement for a participating issuer in another state.⁴ Since the user fee is intended to pay for the operations of a state exchange, it is especially inappropriate for HHS to allow the user fee to reimburse for services across state lines. This is a significant departure from existing policy and goes well beyond statutory authority.

Violation of the Prohibition on Wasteful Spending

Section 1311 of the ACA does not authorize any health care service to be furnished, funded, or reimbursed by the exchange user fee. Moreover, the law does not authorize the user fee to go toward a provider's or issuer's margins. In fact, the ACA prohibits the use of wasteful funds

² Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,869 (July 2, 2013).

³ 42 U.S.C. § 18031(d)(5)(A) (emphasis added).

⁴ Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,254.

when carrying out the implementation of the exchange, which includes prohibiting “promotion of Federal or State legislative and regulatory modifications.”⁵

Furthermore, Congress provides no funding mechanism for Section 1001 of the ACA, which mandates that plans cover all preventative health services. The Congressional Budget Office (CBO) did not provide an individual estimate of Section 1001 because it was not believed to have a direct impact on spending outside its effect on premiums.⁶

While the Notice of Proposed Rulemaking (NPRM) states that it is not proposing to raise the FFE or SBE-FP user fee rates finalized in the HHS Notice of Benefit and Payment Parameters for 2023 to offset the FFE and SBE-FP user fee adjustments,⁷ there is nothing prohibiting HHS from raising the fee to offset the cost of the individual contraceptive arrangement in the future. If HHS determines that the user fee should be raised, it will offset the costs of the individual contraceptive arrangement onto all qualified health plans and potentially raise premiums for individuals enrolled in marketplace plans.

The proposed rules estimate that about \$800 million over 10 years will be transferred from the federal government to providers, issuers, and individuals. The Tri-Agencies are essentially using the ACA user fees as a slush fund to pay for contraceptive services. This will set a dangerous precedent that would allow these fees to fund virtually any type of health care service. For example, following the March 30 ruling in *Braidwood Management* that the PrEP coverage mandate violates individuals’ religious rights, will the accommodation process and individual contraceptive arrangement be used to fund free access to PrEP drugs?

The Individual Contraceptive Arrangement is a New Program Unauthorized by Congress

We oppose the proposed rules’ creation of an unauthorized new regulatory program aimed at providing free contraceptives to individuals covered by employer-sponsored plans. This proposal duplicates the many programs currently authorized to provide contraceptive services, such as the Title X Family Planning Program.

Title X program regulations require each project to provide “a broad range of acceptable and effective medically approved family planning methods” and also require that “contraceptive services should include consideration of a full range of FDA-approved contraceptive methods.”⁸ The program was appropriated more than \$286 million in Fiscal Year 2023.⁹ If Congress believed that a new program to provide contraceptive services was needed, then it would enact such a program with the proper guardrails in place to ensure oversight and accountability.

We are also concerned that the proposed rules will result in inappropriate spending and potential misuse. For example, the proposed rules allow for providers to set their own reimbursement rates

⁵ 42 U.S.C. § 18031(d)(5)(B).

⁶ Email from CBO (on file).

⁷ Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,258.

⁸ <https://www.crs.gov/Reports/R46785> (internal quotation marks omitted).

⁹ Pub. L. No. 117-328 (2022).

and allow the participating issuer to pass along the cost to HHS by submitting the total dollar amount of the provider's cost of furnishing the contraceptive services, plus an administrative fee and margin.¹⁰ In exchange, HHS lowers the issuer's exchange fee. This would allow providers to bill at potentially higher rates without proper incentives to curb costs. CBO has estimated that similar proposals, which negatively interfere with a plan sponsor's ability to negotiate rates, will increase the cost of the service or product, which will lead to higher government spending.¹¹

The Proposed Rules Create a New Government Funding Stream for Abortion Providers and Supporters

We are gravely concerned that the proposed rules not only violate the religious and conscience rights of Americans but they also create a back-door funding stream for abortion providers like Planned Parenthood. Similar to Title X funding, the proposed rules could fund abortion providers by allowing them to become preferred providers under the individual contraceptive arrangement and seek federal reimbursements for contraceptive services from qualified health plans. The NPRM cites the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which leaves abortion laws to the states, as justification for rulemaking.¹² To emphasize the point, HHS Secretary Becerra announced the proposed rules at Planned Parenthood's annual Organizing and Patient Advocate Summit. At the summit, Secretary Becerra announced that he plans to build upon the proposed rules with more pro-abortion-rights actions in the month ahead, stating, "Abortion is health care."¹³

We are additionally concerned that Women's Preventative Services Initiative (WPSI) is managed and controlled by the American College of Obstetricians and Gynecologists (ACOG).¹⁴ As you know, the ACA requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to provide coverage of preventative health services without cost-sharing.¹⁵ In 2011, the Health Resources and Services Administration (HRSA) at HHS worked with the Institutes of Medicine to develop the initial Women's Preventative Service Guidelines, which recommended that all Food and Drug Administration (FDA)-approved contraceptives be included in the ACA's definition of preventative care. Since then, HRSA has awarded a five-year cooperative agreement to ACOG in 2016 and again in 2021 to create and maintain WPSI. The purpose of the WPSI is to develop recommendations to update the guidelines, which are then adopted by HRSA and become mandated coverage requirements for all group plans.¹⁶

Unfortunately, ACOG has chosen to politicize women's health care by excluding providers who support protecting women's health and the unborn from its annual conference with no

¹⁰ Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,256.

¹¹ <https://www.cbo.gov/publication/57957>.

¹² Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,241.

¹³ <https://www.politico.com/newsletters/politico-pulse/2023/01/31/biden-says-the-covid-emergencys-over-00080216>.

¹⁴ <https://www.womenspreventivehealth.org/about-wpsi/>.

¹⁵ 42 U.S.C. § 300gg-13.

¹⁶ <https://www.hrsa.gov/womens-guidelines>.

explanation.¹⁷ Additionally, ACOG fails to acknowledge the adverse health effects caused by abortion by blanketly endorsing access to abortion. Its website states that “ACOG strongly opposes any effort that impedes access to abortion.”¹⁸

We are deeply concerned that ACOG is in a position to issue recommendations that result in mandated coverage requirements for all employer-sponsored plans. The proposed rules’ creation of the individual contraceptive arrangement amplifies these concerns. In addition, the individual contraceptive arrangement creates a new infrastructure system that can be used in future rulemaking to provide federally funded free care for any service ACOG deems to be preventative care.

Dr. Anthony LoSasso, a Professor at the University of Illinois at Chicago School of Public Health, helped draft HRSA’s initial recommendations in 2011. He wrote regarding the recommendation process that “the recommendations were made without high quality, systematic evidence of the preventive nature of the services considered” and “the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee’s composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy.”¹⁹

The Coverage Mandates Created by the ACA Preventative Care Mandate and the Proposed Rules Violate Individuals’ Constitutional Rights and Religious Freedoms

We oppose the Tri-Agencies’ removal of exemptions for entities and individuals that object to the contraceptive coverage requirement based on moral convictions.²⁰ The removal of this exemption would violate the constitutional rights of these organizations and the religious freedom of their employees.

For example, in the case of *March for Life v. Burwell*, March for Life and its employees objected on moral conscience grounds to the insurance coverage mandate for contraceptives that they deem abortifacients.²¹ The court agreed that the rules requiring March for Life to cover abortifacients violated the equal protection clause of the Fifth Amendment. The court also held that the rules violated the rights of March for Life employees under the *Religious Freedom Restoration Act* (RFRA). The proposed rules would violate the rights of similar organizations and their employees who have moral objections to the mandate.

HHS’ HRSA is not the only agency that has issued ACA preventative care mandates which violate individuals’ religious freedoms. On March 30, the U.S. District Court of the Northern District of Texas ruled that the ACA preventative care coverage requirements in response to

¹⁷ <https://www.foxnews.com/media/american-college-ob-gyns-bans-pro-life-doctors-conference-vague-explanation>.

¹⁸ <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy>.

¹⁹ Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838, 47,841 (proposed Oct. 13, 2017) (internal quotation marks omitted).

²⁰ Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,249.

²¹ 128 F.Supp.3d 116 (D.D.C. 2015).

certain ratings by the U.S. Preventative Services Task Force (USPSTF) violate RFRA and the Constitution's Appointments Clause.²² When referring to the USPSTF's mandate that all plans cover preexposure prophylaxis (PrEP) drugs used to treat persons at high risk of HIV acquisition, the court stated, "It is undisputed that putting individuals to this choice imposes a substantial burden on religious exercise. ... Thus, Plaintiffs have shown that the PrEP mandate substantially burdens their religious exercise." It is clear that the services deemed preventative care by unelected bureaucrats unduly burden the religious freedoms of Americans.

The Tri-Agencies' claims that they are not required to maintain an exemption for moral conscience objections is false.²³ Under no circumstances may the federal government violate the constitutional rights or religious freedoms of any American citizen or organization.

Conclusion

The proposed rules flagrantly violate current law and Americans' rights. They create an unauthorized program paid for by an Obamacare slush fund to further the radical agenda of abortion supporters. In doing so, they violate constitutional and religious rights. This is nothing more than a political ploy to create a new funding stream for abortion providers like Planned Parenthood under the guise of delivering preventative health care to women. We urge you to withdraw these rules and protect individuals with religious and moral conscience objections.

Sincerely,



Virginia Foxx
Chairwoman



Bob Good
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions

²²Braidwood Mgmt. Inc. v. Becerra, No. 20-00283 (N.D. Tex. Mar. 30, 2023) (second mem. opinion & order on remedies in relation to plaintiffs' mot. for summary j.).

²³Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. at 7,249.